Comments

The Procedural Filing Requirements of Title VII in Deferral States: The Need for Legislative Action

I. Introduction

Title VII of the Civil Rights Act of 1964, as amended,[1] prohibits employment discrimination on the basis of race, sex, religion, color, and national origin. The Act created the Equal Employment Opportunity Commission (EEOC)[2] and established a complex system of administrative and judicial enforcement to provide a federal remedy for the victims of employment discrimination. An individual who alleges a violation of Title VII must follow the procedural requirements of the Act or lose the possibility of a federal remedy.[3]

One procedural requirement of Title VII is the filing of a timely charge of employment discrimination with the EEOC.[4] In *Mohasco Corp. v. Silver*[5] the Supreme Court interpreted the filing requirements of the Act. This Case Comment will review the procedural filing requirements of Title VII and the appropriate legislative history. It will then examine the Supreme Court's decision in *Mohasco Corp. v. Silver* and will conclude by presenting a proposal for legislative change.

II. The Procedural Requirements of Title VII

The EEOC was created by Congress to enforce the provisions of Title VII.[6] Congress has also delineated the procedures that the EEOC must follow in processing a complaint under the Act.[7] A person alleging a violation of Title VII initiates the procedure by filing a complaint with the EEOC.[8] If a state or local agency exists that is qualified to deal with the problem, the EEOC is required by the Act to defer the complaint to that agency for a period of sixty days or until the agency terminates its proceedings, whichever occurs earlier.[9]

After receiving the complaint, or after the required deferral period has elapsed, the EEOC investigates and determines the validity of the claim.[10] If the Commission finds probable cause to believe a violation of Title VII has occurred, it will attempt to remedy the situation through conference, concilia-

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1. 42 U.S.C. §§ 2000e to 2000e-17 (1976).
2. *Id.*, §§ 2000e-4(a), 2000e-5(e) (1976).
3. The procedural requirements of Title VII are set out in text accompanying notes 6–22 *infra*.
4. 42 U.S.C. § 2000e-5(e) (1976).
5. 447 U.S. 807 (1980).
6. 42 U.S.C. §§ 2000e-4(a), 2000e-5(a) (1976).
7. *Id.*, § 2000e-5 (1976).
8. *Id.*, § 2000e-5(e) (1976).
9. *Id.*, § 2000e-5(c) (1976).
10. *Id.*, § 2000e-5(b) (1976).

tion, or persuasion.[11] If the complaint is not resolved through these methods or if the Commission does not find probable cause to believe a violation of Title VII has occurred, the complainant will be issued a "right to sue" letter.[12] This letter authorizes the filing of a private action in federal district court within ninety days of the receipt of the letter.[13] "This unique combination of administrative and judicial action in dealing with employment discrimination claims has caused a good deal of procedural confusion. An example of this confusion is found in the vague filing requirements of Title VII."[14]

The filing of a timely charge with the EEOC is a procedural prerequisite to any federal court action under Title VII.[15] The filing requirements are contained in section 706(c)[16] and section 706(e)[17] of the Act. Section 706(c) currently provides in part:

> In the case of an alleged unlawful employment practice occurring in a State . . . which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice . . . *no charge may be filed [with the EEOC] by the person aggrieved before the expiration of sixty days after proceedings have been commenced under State or local law* unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days under the first year after the effective date of such State or local law.[18]

The language of section 706(c) must be read in conjunction with the language contained in section 706(e) that currently provides in part:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . except that *in the case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice . . . such charge shall be filed . . . within three hundred days after the alleged unlawful employment practice occurred*, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier.[19]

Thus, under the statute if a complainant lives in a state that has no state or local agency qualified to deal with the problem, the charge must be filed with the EEOC within 180 days after the occurrence of the alleged unlawful employment practice.[20]

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11. *Id.*
12. *Id.* § 2000e-5(f) (1976).
13. *Id.*
14. Comment, *Title VII—Timely Filing Requirement in Deferral States Is Satisfied When the Initial Complaint Is Received by the EEOC Within the 300 Day Limitation of § 706(e)*, 55 NOTRE DAME LAW. 396, 398 (1980).
15. Coleman, *Title VII of the Civil Rights Act: Four Years of Procedural Education*, 8 DUQ. L. REV. 1, 5 (1969–1970).
16. 42 U.S.C. § 2000e-5(c) (1976).
17. *Id.* § 2000e-5(e) (1976).
18. *Id.* § 2000e-5(c) (1976) (emphasis added).
19. *Id.* § 2000e-5(e) (1976) (emphasis added).
20. *Id.*

However, if the complainant lives in a so-called "deferral state," in which there is a state or local agency equipped to handle the matter, the charge must be filed with the EEOC within 300 days after the occurrence of the alleged unlawful employment practice.[21] Furthermore, in such deferral states, no charge may be filed with the EEOC until after the expiration of the mandatory deferral period.[22]

Thus, the time limits for filing a charge with the EEOC are not the same for every individual. This complicated filing system seems out of place in the context of a statute that attempts to guarantee equality of opportunity to all workers. The legislative history of Title VII shows why Congress adopted these inconsistent filing requirements.

III. THE HISTORY OF THE PROCEDURAL FILING REQUIREMENTS OF TITLE VII

In 1963, President Kennedy sent legislation to Congress that became the Civil Rights Act of 1964. Title VII of that Act was the first attempt by the federal government to provide comprehensive guaranties of equal employment opportunity at the national level.[23] "Its passage, over a well-organized and powerful opposition, was accomplished after what has been termed 'an epic legislative struggle' and the legislative product that emerged provides a classic example of congressional compromise."[24]

Title VII has been decried as less than a model of legal draftsmanship. "Nowhere is this indictment more deserved than in the sections dealing with the procedures preliminary to court enforcement. . . . [T]he law's procedural aspects are often paramount to the substantive provisions to which they are the threshold."[25]

The drafters of Title VII envisioned a system of dual enforcement with both state and federal governments cooperating to eliminate employment discrimination. While the EEOC was created to oversee federal enforcement of the Act, the integrity of state and local Fair Employment Practice (FEP) agencies was preserved by the specific provision for concurrent jurisdiction when the claim arose in a state that had such an FEP agency.[26]

> The core of the dual enforcement scheme is a deferral system that requires the EEOC to refer complaints of employment discrimination to a fair employment

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21. *Id.*

22. *Id.* § 2000e-5(c) (1976).

23. *See* Comment, *A Look At* Love v. Pullman Co., 37 U. CHI. L. REV. 181 (1969).

24. Coleman, *Title VII of the Civil Rights Act: Four Years of Procedural Education*, 8 DUQ. L. REV. 1, 1 (1969–1970). *See generally* Miller v. International Paper Co., 408 F.2d 283, 286 (5th Cir. 1969); B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 860 (1976); Vaas, *Title VII Legislative History*, 7 B. C. IND. & COM. L. REV. 431 (1966).

25. Coleman, *Title VII of the Civil Rights Act: Four Years of Procedural Education*, 8 DUQ. L. REV. 1, 2–3 (1969–1970).

26. At the time the Civil Rights Act was passed in 1964, 25 states had FEP laws. By regulation, the EEOC has designated certain FEP agencies as "designated 706 agencies" for purposes of the mandatory deferral requirements contained in § 706(c) of Title VII. *See* 29 C.F.R. § 1601.74(a) (1979).

> practices agency in the state in which the complaint arose, and refrain from taking action until the state has been given an opportunity to resolve the matter under its laws. This system was intended to insure state involvement in the enforcement process, and, at the same time, to lighten the heavy enforcement burden of the EEOC.[27]

A. *The Legislative History of the 1964 Act*

The House of Representatives passed its version of the Comprehensive Civil Rights Act on February 10, 1964.[28] Title VII of the House bill contained a six-month limitations period for a complainant to file a charge with the EEOC. The House version, which did not contemplate differing treatment of complaints based upon the existence of a state FEP agency, met with strong opposition in the Senate.

> The principal opposition focused not on the details of the bill, but on its fundamental purpose. During the course of one of the longest fillibusters in the history of the Senate, the bipartisan leadership of the Senate carefully forged the compromise substitute (Dirksen compromise) that was ultimately to become in substantial part the Civil Rights Act of 1964.[29]

Section 706(d) of the compromise bill provided that a charge of employment discrimination must be filed with the EEOC within ninety days of the alleged act of discrimination,[30] one-half the time limitation adopted by the House. Section 706(b) of the compromise bill introduced the concept of mandatory deferral, whereby the EEOC must allow a state or local agency, if one exists, sixty days in which to resolve the problem under the local law. Section 706(d) extended to 210 days the time within which complainants in deferral states must file with the EEOC.[31] In drafting this modification, the Senators considered that many states and localities already had enacted FEP laws.[32] "[Section] 706(d)'s longer time of 210 days for filing with the EEOC in deferral States was included to prevent forfeiture of a complainant's federal rights while participating in state proceedings."[33] As finally enacted by Congress, Title VII contained the procedures called for in the compromise.

B. *Interpretation of the 1964 Act*

The EEOC issued procedural regulations that interpreted the filing requirements contained in subsections (b) and (d) of the 1964 Act.[34] The

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27. Shawe, *Employment Discrimination—The Equal Employment Opportunity Commission and the Deferral Quagmire*, 5 U. BALT. L. REV. 221, 222 (1976). *See generally* Bukes, *Administrative Prerequisites to Litigation Under Title VII of the Civil Rights Act of 1964—Recent Developments*, 17 DUQ. L. REV. 633, 655 (1978–1979); Comment, *A Look at* Love v. Pullman Co., 37 U. CHI. L. REV. 181, 182 (1969); 110 CONG. REC. 12,724–25 (1964) (remarks of Senator Humphrey).

28. *See* 110 CONG. REC. 2511–12 (1964).

29. Mohasco Corp. v. Silver, 447 U.S. 807, 819–820 (1980).

30. 110 CONG. REC. 12,593–94 (1964) (remarks of Senator Clark).

31. Mohasco Corp. v. Silver, 447 U.S. 807, 820 (1980).

32. *See* 110 CONG. REC. 12,721–25 (1964) (remarks of Senator Humphrey); *id.* at 8192–95 (1964) (remarks of Senator Dirksen).

33. Mohasco Corp. v. Silver, 447 U.S. 807, 821 (1980).

34. 29 C.F.R. § 1601.12 (1968).

Commission determined that if a state did not have a state or local agency that was empowered to handle a discrimination claim, the EEOC would consider the charge to be filed upon receipt of the complaint by the federal agency. If a claim arose in a deferral state and the charge was received by the EEOC before the complainant had filed with the appropriate state or local agency, the EEOC would refer the charge to the appropriate agency and consider the charge to be filed upon the expiration of the mandatory deferral period.[35] By this regulation, the EEOC sought to protect the rights of complainants and to comply with the statutory language that no charge could be filed with the EEOC during the deferral period. The EEOC also sought to comply with the congressional objective of allowing the states to have an initial period of exclusive jurisdiction over such complaints.

The validity of this procedural regulation was upheld by the Supreme Court in *Love v. Pullman Co.*[36] In *Love* the complainant sent a letter to the EEOC alleging that his employer had discharged him because of his race. Because the claim arose in Colorado, a deferral state, the EEOC referred the charge to the appropriate state agency pursuant to EEOC regulations. The state agency notified the EEOC that no action would be taken on the charge. The EEOC considered the charge to be filed with the Commission on receipt of this notice because such notice ended the mandatory deferral period. After investigation, the EEOC found probable cause to believe a violation of Title VII had occurred.[37] Love filed his action upon receipt of a right to sue letter. The Pullman Company moved to dismiss the complaint on the grounds that Love had not filed a timely charge with the EEOC after the state agency refused to take action on the charge.[38]

The Supreme Court interpreted the language of subsections (b) and (d) of the 1964 Act to allow the EEOC, rather than the complainant, to initiate proceedings with the appropriate state or local agency.[39] When a charge of employment discrimination arose in a deferral state and was filed initially with the EEOC, the EEOC could refer the charge to the proper state or local agency and hold the complaint "in 'suspended animation,' automatically filing it upon termination of the state proceedings."[40] The complainant was not required to file a second charge with the EEOC after the deferral period.[41] The Court declared that use of this "procedure [by the EEOC] complies with the purpose both of § 706(b), to give state agencies a prior opportunity to consider discrimination complaints, and of § 706(d), to ensure expedition in the filing and handling of those complaints."[42] Congress relied on this case during the debates preceding the 1972 amendments to Title VII.[43]

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35. *Id.*
36. 404 U.S. 522 (1971).
37. *Id.* at 524.
38. *Id.*
39. *Id.* at 526.
40. *Id.*
41. *Id.*
42. *Id.*
43. *See* text accompanying notes 45–59 *infra*.

C. *The 1972 Amendments to Title VII*

Title VII was amended in 1972. "[The] amendments, while increasing the length of certain time periods, left the essential procedural structure of the 1964 Act relatively unchanged."[44] Like the 1964 Act, the amendments were the result of a compromise worked out in conference committee.

Section 706(d) of the 1964 Act became section 706(e) and the time period for filing an employment discrimination charge with the EEOC was lengthened. Both the House bill and the Senate bill required charges to be filed with the EEOC within 180 days after the alleged act of discrimination,[45] double the time period allowed under the 1964 Act. The Senate bill allowed an additional 120 days to file with the EEOC if a charge was deferred to a state agency, while the House Bill allowed only thirty additional days.[46] The Senate's version was adopted by the conference committee.

Section 706(b) of the 1964 Act became section 706(c) and was left basically unchanged. The Senate proposed an amendment to remove any reference to filing in section 706(c) and to substitute language stating that the EEOC could take no action on a charge until after the expiration of the deferral period.[47] This amendment was patterned after the EEOC procedural regulations and would have clarified the statute.[48] The Senate Report asserted:

> The present statute is somewhat ambiguous respecting Commission action on charges filed prior to resort to the State or local agency. The new language clarifies the present statute by permitting the charge to be filed but prohibiting the Commission from taking action with respect thereto until the deferral period has elapsed.[49]

The House bill, adopted by the conference committee, made no change in the wording of the statute. The reason the Senate amendment was not adopted was articulated in the conference committee report: "The conferees left existing law intact with the understanding that the decision in *Love v. Pullman Co.* . . . interpreting the existing law to allow the Commission to receive a charge (but not act on it) during such deferral period is controlling."[50] An analysis of the conference committee report discussed section 706(c) of the Act, restated the conferee's language cited above, and added, "Similarly, the recent circuit court decision of *Vigil v. AT & T* . . . is within the intent of this Act."[51]

In *Vigil*,[52] the plaintiff filed an employment discrimination charge with

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44. B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 861 (1976).

45. S. CONF. REP. NO. 681, 92d Cong., 2d Sess. 17 (1972), H. R. CONF. REP. NO. 899, 92d Cong., 2d Sess. 17 (1972), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2137, 2181.

46. *See* sources cited in note 45 *supra*.

47. 118 CONG. REC. 290 (1972).

48. *See* discussion of the EEOC regulations in text accompanying notes 34–35 *supra*.

49. S. REP. NO. 412, 92d Cong., 1st Sess. 36 (1971).

50. S. CONF. REP. NO. 681, 92d Cong., 2nd Sess. 17 (1972), H. R. CONF. REP. NO. 899, 92d Cong., 2d Sess. 17 (1972), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2137, 2181.

51. 118 CONG. REC. 7167 (1972) (Senate); 118 CONG. REC. 7564 (1972) (House of Representatives).

52. Vigil v. AT & T, 455 F.2d 1222 (10th Cir. 1972).

the Colorado Civil Rights Commission. Eighteen days later, Vigil sent a similar charge to the EEOC. The EEOC treated the charge as if it had been filed sixty days after the date Vigil filed his initial claim with the state agency because that date was the expiration of the mandatory deferral period.[53] The EEOC processed the charge and found probable cause to believe a violation of Title VII had occurred. A right to sue letter was issued and Vigil filed suit.[54]

AT & T argued that Vigil's filing with the EEOC was not timely because, according to the plain language of the statute, a charge could not be filed with the EEOC during the deferral period.[55] The Tenth Circuit Court of Appeals held that allowing a party to file with the EEOC during the deferral period was within the intent of the Act, although the EEOC could take no action on the charge until after the expiration of the deferral period.[56] The court considered its decision mandated by *Love v. Pullman Co.*[57]

The legislative history, therefore, indicates that Congress believed the *Love* decision made the proposed Senate amendment totally unnecessary. The conference committee relied on *Love* for the proposition that a charge could be filed with the EEOC during the deferral period.[58] However, *Love* does not so hold. In discussing the EEOC's regulation that allows a charge to be filed upon receipt, the Court in *Love* stated: "[T]he statutory prohibition of § 706(b) [now § 706(c)] against filing charges [with the EEOC] that have not been referred to a state or local authority necessarily creates an exception to the regulation of filing on receipt."[59] Thus, the Court in *Love* actually indicated that a charge could not be filed with the EEOC during the mandatory deferral period.

This congressional misinterpretation of the *Love* decision became a major issue in the case of *Mohasco Corp. v. Silver*,[60] in which the Supreme Court once again interpreted the filing requirements of Title VII.

IV. *Mohasco Corp. v. Silver*

A. *Background*

On August 29, 1975, Ralph Silver, an economist, was discharged by the Mohasco Corporation. Two hundred and ninety-one days later, the EEOC received a letter from Silver alleging that his discharge had been motivated by religious discrimination. The EEOC, following the procedural requirements of Title VII, promptly referred Silver's charge to the New York State Division of Human Rights.[61]

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53. *Id.* at 1223
54. *Id.*
55. *Id.* at 1224.
56. *Id; see* discussion at note 83 *infra.*
57. Vigil v. AT & T, 455 F.2d 1222, 1224 (1972); *see* discussion of Love v. Pullman Co. in text accompanying notes 36–42 *supra.*
58. Mohasco Corp. v. Silver, 447 U.S. 807, 832 (1980) (Blackmun, J., dissenting); *see also* discussion of the conference committee report in text accompanying note 50 *supra.*
59. Love v. Pullman Co., 404 U.S. 522, 526 n.5 (1971).
60. Mohasco Corp. v. Silver, 447 U.S. 807 (1980).
61. *Id.* at 810.

The EEOC advised the state agency that pursuant to its procedural regulations, the charge would be filed automatically with the EEOC at the end of the sixty days deferral period or on the 300th day after the alleged act of discrimination.[62]

The EEOC began formal processing of Silver's charge on August 20, 1976, almost one year after his discharge.[63] On February 9, 1977, the state agency issued a determination that there was no probable cause to believe that Mohasco had discriminated against Silver.[64] On August 24, 1977, the EEOC adopted the findings of the state agency and issued a right to sue letter, which allowed Silver to pursue his claim in federal district court. Silver filed his action on November 23, 1977, in the Northern District of New York. Mohasco responded by moving for summary judgment, arguing that Silver's claim was time-barred under Title VII because it was not filed with the EEOC within 300 days of the occurrence of the alleged unlawful employment practice.[65]

The Supreme Court defined the issue as whether "Congress intended the word 'filed' to have the same meaning in subsections (c) and (e) of § 706."[66] According to subsection (c), no charge may be *filed* with the EEOC until the state or local agency has had sixty days to consider the matter; according to subsection (e), a charge must be *filed* with the EEOC in a deferral state within 300 days of the alleged act. If the EEOC could consider the charge to be filed on the day it was received, Silver's charge would have been timely. If the EEOC could not consider the charge to be filed until after the mandatory deferral period, Silver's charge would not have been timely because the 60-day deferral period did not end until 351 days after the alleged act of discrimination.

B. *Action in the Lower Courts*

The district court[67] granted Mohasco's motion for summary judgment on the ground that Silver's failure to file a timely charge with the EEOC deprived the court of subject matter jurisdiction.[68] The district court read subsections

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62. 29 C.F.R. § 1601.12(b)(1)(v)(A) (1977). The regulation then in effect stated:

> In cases where the document is submitted to the Commission more than 180 days from the date of the alleged violation . . . , the case shall be deferred pursuant to the procedures set forth above: *Provided, however,* That unless the Commission is earlier notified of the termination of the State or local proceedings, the Commission will consider the charge to be filed with the Commission on the 300th day following the alleged discrimination and will commence processing the case.

Id. (emphasis in original). The current regulation is at 29 C.F.R. § 1601.13 (1979).

63. Comment, *Title VII—Timely Filing Requirement in Deferral States Is Satisfied When the Initial Complaint Is Received by the EEOC Within the 300 Day Limitation of § 706(e),* 55 NOTRE DAME LAW. 396, 397 (1980).

64. Mohasco Corp. v. Silver, 447 U.S. 807, 810 n.5 (1980).

65. Silver v. Mohasco Corp., 602 F.2d 1083, 1086 n.7 (2d Cir. 1979), *rev'd,* 447 U.S. 807 (1980).

66. Mohasco Corp. v. Silver, 447 U.S. 807, 809 (1980).

67. Silver v. Mohasco Corp., 497 F. Supp. 1 (N.D.N.Y. 1978), *rev'd,* 602 F.2d 1083 (2d Cir. 1979), *rev'd,* 447 U.S. 807 (1980).

68. *Id.* at 13.

(c) and (e) literally and held that Silver's charge could not be filed with the EEOC under section 706(c) until sixty days after the charge had been filed with the state agency. "Because that date was 51 days beyond § 706(e)'s 300-day time limit for filing [with the EEOC] in so-called 'deferral states,' the charge was not timely filed."[69]

The court decided that the word "filed" has the same meaning in both subsections (c) and (e) of the Act. When in subsection (c) the statute says "no charge may be filed," it means literally that no charge can be filed with the EEOC during the deferral period. Since subsection (e) requires that a charge must be filed within 300 days after the alleged act, it was not possible for Silver to file a timely charge with the EEOC. The district court refused to apply the EEOC regulation that would have considered the charge to be timely,[70] because it considered the regulation "contrary to the plain meaning of the statute."[71]

The Second Circuit Court of Appeals reversed the district court[72] and held that "[t]he requirement in § 706(c) that no charge may be 'filed' before the deferral period ends simply means the EEOC may not process a Title VII complaint until sixty days after it has been referred to a state agency."[73] The court concluded that a literal reading of the statute did not give sufficient weight to the overriding purpose of the Act and was not faithful to the "strong federal policy in ensuring that employment discrimination is redressed."[74] The court stated, "[W]e have resisted any temptation to require technical precision of Title VII plaintiffs, who often proceed without counsel."[75] According to the appellate court, the district court decision required a Title VII complainant to file his charge with the EEOC within 240 days after the discriminatory act or lose the possibility of any federal remedy.[76] The problem with such a requirement is that a layman who reads the statute may not understand the 240-day limitation because the number 240 does not appear anywhere in the Act.[77]

Therefore, the appeals court held, in a deferral state a charge must be received by the EEOC within 300 days after the alleged act of discrimination per section 706(e). After receipt by the EEOC, according to section 706(c), the charge must be referred to the proper state or local agency and the EEOC can take no action on the charge until the deferral period expires.[78] This interpretation is in harmony with the overall procedural scheme of Title VII

69. Mohasco Corp. v. Silver, 447 U.S. 807, 812 (1980).
70. *Id. See* 29 C.F.R. § 1601.12 (1977), in note 62 *supra*.
71. Mohasco Corp. v. Silver, 447 U.S. 807, 813 (1980).
72. Silver v. Mohasco Corp., 602 F.2d 1083 (2d Cir. 1979), *rev'd*, 447 U.S. 807 (1980).
73. *Id.* at 1088.
74. *Id.* at 1087.
75. *Id.* Silver filed his own complaint in the District Court. 447 U.S. 807, 811 n.10 (1980). However, at the trial and on appeal, he was represented by counsel.
76. 602 F.2d 1083, 1087 (2d Cir. 1979).
77. *Id.*
78. *Id.* at 1088.

that allows state agencies an opportunity to resolve disputes between employers and employees before intervention by the federal agency.[79] The court thus concluded that since Silver's charge was received by the EEOC before the 300 day limit of section 706(e) had expired, his charge was timely filed under Title VII.[80]

C. *Decision of the Supreme Court*

1. *The Majority Opinion*

In reversing the Second Circuit, the Supreme Court[81] noted that a conflict existed among various courts of appeals on the issue involved in *Silver*.[82] The decision of the Second Circuit in *Silver* was consistent with the holding of the Tenth Circuit in *Vigil v. AT & T*[83] but conflicted with the decision of the Seventh Circuit in *Moore v. Sunbeam Corp.*,[84] a case decided under the 1964 Act. In *Moore*, the court held that an employment discrimination charge could not be filed with the EEOC during the deferral period.[85] According to the court, its interpretation of the filing requirements met the "stated 'purpose both of § 706(b) [now § 706(c)], to give the state agencies a prior opportunity to consider discrimination complaints, and of § 706(d) [now § 706(e)], to ensure expedition in the filing and handling of those complaints.'"[86]

The Eighth Circuit Court of Appeals opinion in *Olson v. Rembrandt Printing Co.*[87] also conflicted with the decision of the Second Circuit in *Silver*. The Eight Circuit held in *Olson* that to preserve the federal rights guaranteed by Title VII, a complainant must always file his initial charge with either the EEOC or a deferral agency within 180 days as required by the first sentence of section 706(e). If the charge is filed initially with the appropriate agency in a deferral state, the complainant has the benefit of the extension contained in section 706(e) that allows 300 days in which to file the charge with the EEOC.[88]

The Supreme Court resolved this conflict in *Silver* by adopting the *Moore* rationale[89] and concluding that Silver had not filed a timely charge with the

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79. *Id.*
80. *Id.*
81. Mohasco Corp. v. Silver, 447 U.S. 807 (1980).
82. *Id.* at 814–15.
83. 455 F.2d 1222 (10th Cir. 1972). *See* discussion of *Vigil* in text accompanying notes 52–56 *supra*.
84. 459 F.2d 811 (7th Cir. 1972).
85. *Id.* at 824.
86. *Id.* (quoting Love v. Pullman Co., 404 U.S. 522, 527 (1971)).
87. 511 F.2d 1228 (8th Cir. 1975).
88. *See* discussion of *Olson* in text accompanying notes 124–30 *infra*.
89. Mohasco Corp. v. Silver, 447 U.S. 807, 814–15 n.16 (1980). The *Moore* decision was written by Justice Stevens while he was a judge on the Seventh Circuit Court of Appeals. Moore v. Sunbeam Corp., 559 F.2d 811 (7th Cir. 1972). The court in *Moore* held that no charge could be filed with the EEOC during the deferral period. *Id.* at 824. *See* discussion of *Moore* at notes 84–86 *supra*. In *Moore*, the court was interpreting the filing requirements of the 1964 Act because the case arose prior to the effective date of the 1972 amendments to Title

EEOC.[90] The Court decided that the plain language of the statute dictated that charges arising in a deferral state must be filed with the EEOC within 300 days after the alleged discrimination in order to be timely under section 706(e).[91] The Court read section 706(c) of the Act as prohibiting the filing of a charge with the EEOC until after the expiration of the mandatory deferral period. Under this view, Silver's charge could not have been filed with the EEOC until 351 days after Silver's discharge.[92] Because Silver did not file a timely charge with the EEOC, he lost his right to a federal remedy under Title VII.

The Court examined the legislative history of the filing requirements, to ensure that a literal interpretation of the Act would "effectuate Congress' purpose underlying Title VII."[93] The Court recognized that the purpose of mandatory deferral is "to give state agencies an opportunity to redress the evil at which the federal legislation was aimed, and to avoid federal intervention unless its need [is] demonstrated."[94]

In discussing the 1972 amendments to Title VII, the Court noted that the Senate had proposed an amendment to section 706(c) that, if adopted, would have allowed Silver's charge to be considered as timely filed.[95] The Court concluded that "[t]o the extent that Congress focused on the issue at all in 1972, it expressly rejected the language that would have mandated the exact result that respondent urges."[96] Discussing the conference committee report that stated that "conferees left existing law intact with the understanding that the decision in *Love v. Pullman* . . . is controlling,"[97] the Court correctly noted that a "literal reading of the word 'filed' in section 706 is fully supported by the *Love* opinion."[98] Therefore, according to the majority, the legislative history supported a literal reading of the Act.[99] The Court determined that, consistent with the intent of Congress, a charge could not be filed with the EEOC during the deferral period.[100] Under this interpretation, Silver had not filed a timely charge with the EEOC and therefore could not pursue a remedy in federal court.

VII. The court in *Moore* stated that the legislative history of the 1972 re-enactment was not relevant to a proper interpretation of Title VII's filing requirements as they were enacted in 1964. 559 F.2d 811, 830 (7th Cir. 1972). Justice Stevens is also the author of the majority opinion in *Silver*, which adopts the *Moore* decision. Mohasco Corp. v. Silver, 447 U.S. 807, 814 n.16 (1980). Although the legislative history of the 1972 amendments is discussed in *Silver*, Justice Stevens continues to ignore its relevance. *See* discussion of the legislative history in the majority opinion in text accompanying notes 95–100 *infra*.

90. Mohasco Corp. v. Silver, 447 U.S. 807, 817 (1980).

91. *Id.*

92. *Id.*

93. *Id.*; *see* full discussion of the legislative history in text accompanying notes 23–60 *supra*.

94. 447 U.S. 807, 817 (1980).

95. *Id.* at 822–23. *See* discussion of the proposed amendment in text accompanying notes 47–49 *supra*.

96. *Id.* at 824.

97. *Id.* at 823.

98. *Id.*; *see* discussion of *Love* at note 59 *supra*. The *Moore* decision, which the Court adopted in *Silver*, relied heavily on the decision in Love v. Pullman Co., 404 U.S. 522 (1971).

99. 447 U.S. 807, 822 (1980).

100. *Id.*

2. *The Dissent*[101]

The dissenters "believe[d] that the Court's decision neither [was] correct as a matter of statutory construction, nor [did] it dispel the existing decisional conflict . . . in an acceptable fashion."[102] In their view, Congress intended to adopt an alternative interpretation of the interplay between subsections (c) and (e).[103] The dissent pointed out that the EEOC "has always treated as timely a charge filed within the 300-day period specified in § 706(e), without regard to the 60-day deferral period specified in § 706(c)."[104] In their view this agency interpretation had received congressional approval when Congress reenacted the predecessors to subsections (c) and (e) in 1972.[105] The dissent also placed great weight on the conference committee report that stated, "No change . . . was deemed necessary in view of the recent Supreme Court decision of *Love v. Pullman Co.* . . . which approved the present EEOC deferral procedures as fully in compliance with the intent of the Act."[106]

Although the dissent indicated that the majority opinion in *Silver* is consistent with the *Love* holding, the dissenters believed the majority "obviously err[ed] in interpreting the Conference Report itself. The relevant inquiry is not what this Court actually held in *Love*, as the Court seems to think, but what the Conference Committee writing some six weeks after *Love*, thought that the Court held."[107] At the time of the 1972 amendments, Congress believed that existing law "permitted the EEOC to treat as timely those charges filed in a deferral State within 300 days, without regard to the 'no charge may be filed' language of § 706(c), and intended that that interpretation should continue to be considered 'controlling'."[108] Thus, the dissent concluded that a fair analysis of the legislative history indicated that Congress intended to allow a charge to be filed with the EEOC under § 706(e) during the deferral period.[109] Moreover, as the dissent correctly noted, the *Moore* decision,[110] which the majority adopted as the proper interpretation of the statute, was decided under the 1964 Act and did not consider the effect of the legislative history of the 1972 amendments.[111]

The dissenters would have affirmed the decision of the court of appeals that a charge could be filed with the EEOC during the deferral period although the EEOC would not be permitted to act on the charge until the expiration of sixty days or until termination of state proceedings, whichever occurred

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101. The dissent was authored by Justice Blackmun, who was joined by Justices Brennan and Marshall.
102. Mohasco Corp. v. Silver, 447 U.S. 807, 826 (1980) (Blackmun, J., dissenting).
103. *Id.* at 828–29.
104. *Id.*
105. *Id.* at 829.
106. *Id.* at 831 (quoting 118 CONG. REC. 7167 (1972)).
107. *Id.* at 832.
108. *Id.*
109. *Id.* at 833.
110. *See* discussion of *Moore* in note 89 *supra.*
111. Mohasco Corp. v. Silver, 447 U.S. 807, 829 n.1 (1980) (Blackmun, J., dissenting).

earlier.[112] Under this view, Silver's complaint would have been timely filed with the EEOC.

Because the majority opinion does not reflect the intent of Congress, the dissent concluded, "It remains for Congress to restrike the balance . . . it plainly intended to set when it reenacted §§ 706(c) and (e) in 1972."[113]

V. A Proposal for Legislative Change

A. *The Need for a Change—Problems Created by the Court's Decision in* Mohasco Corp. v. Silver

As pointed out in the dissenting opinion of Justice Blackmun in *Silver*, the interpretation of subsections (c) and (e) of section 706 by the majority of the Court does not create "a fixed and settled procedure for filing a Title VII complaint."[114] The ability of a complainant to file a timely charge with the EEOC will vary depending on several factors, and the resulting inconsistency could lead to many problems.

If the complainant does not live in a deferral state, the charge must be filed with the EEOC within 180 days after the alleged act of discrimination.[115] However, if the complainant does live in a deferral state, the charge must be filed, pursuant to the Court's opinion in *Silver*, soon enough to allow the sixty day deferral period to expire within 300 days.

In other words, section 706(c) requires the expiration of the deferral period before a charge may be filed with the EEOC in a deferral state. The deferral period expires after (1) 60 days if the deferral agency is more than one year old; (2) 120 days if the deferral agency is less than one year old; or (3) termination of the deferral agency's proceedings, which may occur before the 60 or 120 days have elapsed.[116] According to *Silver*, a claim arising in a deferral state will be timely if it is received by the EEOC on a date that allows the deferral period to end within 300 days after the alleged unlawful act. The last day a timely charge could be filed can be determined by the formula: 300 days minus the deferral period equals the last day a timely charge in a deferral state may be filed. The problem with this formula is that the deferral period could be any number between 1 and 120.

Generally, a charge in a deferral state will be timely if it is received by the EEOC within 240 days after the alleged unlawful act. However, a charge filed with the EEOC after the 240th day may be timely if the deferral agency completes its action before the 300th day.

> In other words, if the hypothetical complainant files his charge 270 days after his discharge, and the EEOC refers the charge to the relevant state agency immedi-

112. *Id.* at 828.
113. *Id.* at 835.
114. *Id.* at 833.
115. 42 U.S.C. § 2000e-5(e) (1976).
116. 42 U.S.C. § 2000e-5(c) (1976).

> ately, and that agency terminates its proceedings within 30 days, the federal charge will have been timely filed. But if the state agency does not terminate its proceedings for a year (perhaps due to backlog or, ironically, because the complaint has merit), then the EEOC cannot consider the charge to have been filed until 330 days have elapsed, and the complainant will be unable to invoke his federally protected rights.[117]

An employee in this situation must wait to see whether the state takes speedy action so as to allow him to pursue his federal remedy. "This 'wait and see' rule seems out of place in the context of a federal statute designed to vindicate workers' rights to be free from invidious discrimination in the workplace."[118]

This problem is compounded in the states in which the deferral agency is less than one year old. In such states, the mandatory deferral period is 120 days,[119] and a charge must be filed with the EEOC within 180 days in order to insure that the deferral period will end prior to the 300 day time limit. If a complainant filed with the EEOC after 180 days, timely filing would be determined by the "wait and see" rule.

Title VII is designed to allow workers to file a claim with the EEOC without the aid of an attorney. A layman who is not trained in statutory construction may not be able to discover the general 240-day filing rule for deferral states because in a statute that is full of numbers, the number 240 does not appear. Furthermore, a complainant working in a nondeferral state has only 180 days in which to file a timely charge with the EEOC. Therefore, Title VII, an act with the avowed purpose of outlawing discrimination, does not apply to all workers in the same fashion and thereby discriminates against workers in nondeferral states by requiring them to act with more diligence than is required of workers in deferral states.

The dissent in *Silver* pointed out other problems.

> Will complainants in deferral States be permitted to seek artificially speedy terminations of state proceedings in order to preserve their federal rights? Will employers be permitted to oppose such early terminations of state proceedings? Will state and local agencies be permitted to adopt a practice of terminating proceedings immediately whenever a complainant referred to them by the EEOC needs prompt action in order to preserve his federal remedies? These unanswered questions lead me to conclude that the Court's "rather straightforward reading" of § 706 may indeed lead to "absurd and futile results," despite the Court's conclusion to the contrary.[120]

Congress must provide the answers to these problems. Its purpose in creating the deferral system was to allow the states to solve their own problems according to state law.[121] The stringent time requirements were designed to protect against "the problem of 'second thought complaints,' stale com-

117. Mohasco Corp. v. Silver, 447 U.S. 807, 834 (1980) (Blackmun, J., dissenting).
118. *Id.*
119. 42 U.S.C. § 2000e-5(c) (1976).
120. Mohasco Corp. v. Silver, 447 U.S. 807, 835 (1980) (Blackmun, J., dissenting).
121. *See* 110 CONG. REC. 12,721–25 (1964) (remarks of Senator Humphrey).

plaints and the hampering effect they can have on our labor market."[122] Any proposed change in the statute should achieve these goals as well as solve the problems created by the Silver decision.

B. *Proposed Change—The Previous Senate Amendment*

The amendment offered by the Senate in 1972 would be one method of clarifying the statute. That amendment would have changed section 706(c) to read as follows:

> In the case of a charge filed by or on behalf of a person claiming to be aggrieved alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof *the Commission shall take no action with respect to the investigation of such charge before the expiration of sixty days after proceedings have been commenced under the State or local law,* unless such proceedings have been earlier terminated, except that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such local law.[123]

The amendment would allow the complainant in a deferral state to file a charge with the EEOC within 300 days of the alleged act of discrimination as provided by section 706(e). The EEOC would then refer the charge to the state agency and begin processing the charge after sixty days or after the state agency completed its action, whichever occurred earlier. However, if a complainant lived in a nondeferral state, the charge would have to be filed with the EEOC within 180 days in order to be timely. Thus, a complainant working in a deferral state would have a "bonus" of 120 days in which to initiate his claim with the EEOC.

This scheme would protect the rights of the states by allowing them to act on a claim before the federal agency could intervene. However, a complainant could wait 300 days before initially filing a complaint. Thus, the goal of preventing stale claims would not be furthered. Also, this solution would allow a worker in a deferral state to act within 300 days after the discriminatory act while allowing a worker in a nondeferral state only 180 days. Thus, under the proposed amendment all workers would not be treated equally.

C. *Proposed Change—The Olson Approach*

The approach taken by the Eighth Circuit in *Olson v. Rembrandt Printing Co.*[124] provides a better solution. Olson filed a charge of sex discrimination with the EEOC on April 3, 1972, more than 180 days after she had been

122. Culpepper v. Reynolds Metals, 421 F.2d 888, 892 (5th Cir. 1970).
123. 118 CONG. REC. 290 (1972) (emphasis added).
124. 511 F.2d 1228 (8th Cir. 1975).

discharged.[125] Pursuant to its regulations, the EEOC immediately referred her charge to the Missouri Commission on Human Rights. The state agency returned the charge to the EEOC for processing due to a backlog of complaints at the state agency. Upon investigation, the EEOC found probable cause to believe that a violation of Title VII had occurred. After receiving a right to sue letter, Olson filed an action in federal court.[126]

The court in *Olson* held that the charge had not been timely filed under section 706(e) of the Act, because a charge of discrimination always must be filed within 180 days after the alleged discriminatory act.[127] According to this view, if the claim arose in a nondeferral state, the complainant would have 180 days in which to file a timely charge with the EEOC under the general time limitation contained in section 706(e).

If the claim arose in a deferral state, the complainant would have 180 days in which to file a charge with either the EEOC or a state FEP agency. If the complainant initially filed the charge with a state or local agency, she would receive the benefit of section 706(e)'s extended time limit of 300 days in which to file a timely charge with the EEOC.[128] If the complainant originally filed the charge with the EEOC, the Commission would refer the charge to the proper deferral agency and consider the charge to be filed on the expiration of the deferral period.[129] In either case, a claim that arose in a deferral state would have to be filed within 180 days after the alleged act of discrimination in order to be timely under section 706(e). The legislative history of the Act shows that at least one congressman believed the holding in *Olson* to be the correct interpretation of the statute.[130]

Under the *Olson* view, the state agency always would have the first opportunity to act on a discrimination charge. And the procedure would protect against the filing of stale claims by requiring all charges to be brought within 180 days of the discriminatory act, thereby effectuating the goals of Congress.[131] Moreover, a person working in a deferral state must act in the same timely manner as a person in a nondeferral state.[132] Thus, all workers would be treated equally under the statute.

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125. *Id.* at 1231.

126. *Id.*

127. *Id.* at 1233.

128. *Id.*

129. This was the holding of the Supreme Court in Love v. Pullman Co., discussed in text accompanying notes 36–42, and at note 59 *supra*.

130. 118 CONG. REC. 7569 (1972) (remarks of Rep. Dent).

131. *See* text accompanying notes 121–22 *supra*.

132. The court in *Olson* stated:

> It would not be in keeping with the intent of Congress to allow one individual 300 days to file a charge because of the fortuitous circumstance that the state where the claim arose is a deferral state. . . . The purpose underlying the extended period in a deferral state is to give the state agency an initial opportunity to process the claim without jeopardizing the federal right, not to extend by 120 days the time for assertion of this federal right.

Olson v. Rembrandt Printing Co., 511 F.2d 1228, 1231–32 (8th Cir. 1975).

Under this approach, it would not matter whether the state agency were either more or less than one year old, because the deferral period would end, in either case, before the 300-day limitation period of section 706(e) had passed. Therefore, the *Olson* approach solves all of the problems inherent in the *Silver* solution and, at the same time, effectuates the goals of Congress.

In order to achieve the *Olson* approach, Congress should amend section 706(e) of Title VII to read as follows:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, *except that in the case of an unlawful employment practice with respect to which the person aggrieved has, within one hundred and eighty days after the alleged unlawful employment practice occurred, instituted proceedings with a State or local agency* with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

The addition of the italicized phrase would clarify the ambiguities that are inherent in the current version of the filing requirements of the Act. This amendment would make it clear to future complainants that they have only 180 days in which to file a charge of employment discrimination or lose their federal rights and remedies. The amendment would also have the effect of treating workers in deferral states exactly the same as workers in nondeferral states; each would have 180 days to file an initial complaint. The amendment would protect against stale claims and at the same time allow the states to have the first opportunity to act on the charge.

VI. Conclusion

Congress must take action so that the Title VII filing requirements will effectuate the congressional goal of providing equal employment opportunity to all workers. In *Mohasco Corp. v. Silver* the Supreme Court interpreted the filing requirements of Title VII of the Civil Rights Act of 1964, as amended, in a manner contrary to the legislative history of the Act, thus compounding the problem it sought to solve. Congress should amend section 706(e) of Title VII to clarify the filing requirements of the Act and create a fair and settled procedure for the filing of a Title VII complaint.

Marlene P. Frank